MAR 18 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966, No. 1045.

JOSEPH B. SHEPPARD, SR., et al.,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITIONERS' REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE PETITION FOR CERTIORARI.

STEPHEN M. FELDMAN,
JOSEPH G. FELDMAN,
420-30 #6 Penn Center,
Philadelphia, Pa.,
Attorneys for Petitioners.

Of Counsel:
HY MAYERSON.

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

PETITIONERS' REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE PETITION FOR CERTIORARI.

Respondent cites several Court of Appeals decisions (Resp's Memo. 2-3) as support for the proposition that the *Feres* case has not been modified. However, all of the cases cited by respondent predate *Rayonier v. United States,* 352 U.S. 315 (1957), and *United States v. Muniz,* 374 U.S. 150 (1964), which are the cases petitioners contend substantially modified the prior holding in *Feres.* Moreover, respondent's assertion (Resp's Memo. 3, n. 1) that the *Indian Towing, Rayonier* and *Muniz cases* are inapposite because they involve claims by civilians ignores the analysis of the *Feres* case made in *Muniz,* 374 U.S. at 159-162, in which it was held that *Indian Towing* and *Rayonier* had rendered invalid the various rationales articulated in the *Feres* case.

Respondent suggests (Resp's Memo. at 2) that Congressional silence since *Feres* confirms the holding that Congress intended to exclude recovery by servicemen. However, in the *Muniz* case, 374 U.S. at 158, n. 14, this Court held with regard to prisoners' claims that the construction given an act by a subsequent Congress is not determinative of the intention of the Congress that passed the Act. See also *Helvering v. Hallock,* 309 U.S. 106, 121-2 (1940), which held that "to explain the cause of nonaction by Congress when Congress itself sheds no light is to venture into speculative unrealities."

Respondent's argument that the availability of military and veteran's benefits[1] precludes recovery by servicemen

[1] Veteran's death benefits as it existed at the time of the passage of the Tort Claims Act, 38 U.S.C. §472, 701 (c) (1954 ed.) and as it exists at the present time, 38 U.S.C. §§322 (6), (7), is for the benefit of the widow, children and dependent parents of the servicemen killed on active duty. The complaint in the instant case shows that none of the decedents involved here was survived by a widow, children or dependent parents.

under the Tort Claims Act, is contradicted by the holdings in *Brooks v. United States*, 337 U.S. 49 (1949) and *United States v. Brown*, 348 U.S. 110 (1954). In *Brooks* this court held that a serviceman injured while on leave could recover under the Tort Claims Act, even though he was entitled to the same administrative benefits as if he had been injured in the performance of his military duties,[2] since, unlike the usual workman's compensation law, there is nothing in the veterans laws to indicate Congress intended an exclusiveness of remedies (337 U.S. at 53).

In *Brown* this Court held that a veteran could collect under the Tort Claims Act for negligent treatment in a veteran's hospital of a knee injury he had received on active duty even though he was entitled to full administrative benefits the original injury having been incurred while on active duty.

In support of its argument that the availability of veteran's benefits precludes recovery by servicemen respondent cites *United States v. Demko*, 385 U.S. 149 (1966), in which this court recently held that federal prisoners who are entitled to compensation benefits are precluded from a remedy under the Tort Claims Act. The *Demko* opinion makes no mention of *Brooks*, *Brown* or any other case involving the veterans laws, but instead relies on *Johansen v. United States*, 343 U.S. 427 (1951), and *Patterson v. United States*, 359 U.S. 495 (1959).[3] *Johansen*, which held that a civilian employee of the government who was entitled to benefits under the Federal Employees Compensation Act could not

---

[2] An injury incurred during military service is deemed to have been incurred in the line of duty for purposes of veteran's benefits regardless of whether the serviceman is injured while performing his military duties or while on authorized leave. 38 U.S.C. §105.

[3] **Demko** also cites several lower federal court decisions (385 U.S. at 151, n. 4) none of which involve the veterans law.

sue the United States under the Public Vessels Act, was distinguished in the *Brown* case as follows:

> "Congress could, of course, make the compensation system the exclusive remedy. The Court held in Johansen v. United States . . . that Congress had done so in the case of the Federal Employees Compensation Act, with the result that a civilian employee could not sue the United States under the Public Vessels Act. We noted in the Brooks Case, 337 U.S. 49, 53 . . . that the usual workmen's compensation statute was in this respect different from those governing veterans, that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veteran Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act" (348 U.S. at 113).

The *Patterson* case, which also held that federal employees could not sue the United States under the Public Vessels Act, although decided after *Brown* made no mention of *Brown* or any other serviceman case, but relied entirely on *Patterson*. Thus, a clear dichotomy has evolved in this Court between cases holding that the workmen's compensation laws are a bar to recovery and cases holding that the veteran's laws are not a bar to recovery. Implicit in respondent's argument that *Demko* bars recovery in the instant case is the argument that *Demko* overruled *Brooks* and *Brown* by implication, further emphasizing the need for clarification by this Court.

WHEREFORE, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN M. FELDMAN,
JOSEPH G. FELDMAN,
Counsel for Petitioners.

HY MAYERSON,
Of Counsel.